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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| JOHN HENRY OLSON, et al.,<br>Plaintiffs and Appellants,<br>v.<br>METALCLAD INSULATION CORPORATION,<br>Defendant and Respondent. | A102605<br><br>(City and County of San Francisco Super. Ct. No. 408324) |

John Henry Olson and his wife Toni sued Metalclad Insulation Corporation, among many other defendants, alleging that John Olson's mesothelioma was caused by exposure to asbestos in Metalclad products. The trial court granted Metalclad's motion for summary judgment. The Olsons appeal from the ensuing judgment. We reverse.

## BACKGROUND

Metalclad's motion was based on the claim that the Olsons' "discovery responses are so factually vague that a connection between Mr. Olson and Metalclad cannot be established." Metalclad contended the Olsons (1) failed to mention any Metalclad products that Olson may have been exposed to during his career in the Navy, or how he was exposed; (2) failed to explain what information the witnesses he identified might possess or to provide contact information for them; (3) referred to "hundreds or thousands of depositions" already revealed to Metalclad in other asbestos litigation, without specifying any such depositions; and (4) failed to indicate how Olson's

deposition transcript, military records, Social Security records, medical bills, and repair records for the ship he served on, the USS Mispillion, supported his claim that he was exposed to Metalclad asbestos products while in the Navy. Metalclad argued that the lack of "any significant probative evidence" in the Olsons' responses shifted the burden of proving the existence of a triable issue on causation to them, which was a burden which they could not meet.

In response, the Olsons claimed they had disclosed their theory that John Olson was exposed to asbestos products supplied by Metalclad to Syd Carpenter Marine (SCM), an insulation contractor that performed the vast majority of the insulation work at Todd Shipyard in San Pedro during the early 1960's. They asserted Metalclad was present at previous depositions where testimony was given and invoices produced showing that SCM used Metalclad materials and worked on the USS Mispillion. Therefore, they disputed that the burden of proof on causation shifted to them, but even if it did they contended their evidence of asbsestos exposure on board the USS Mispillion at Todd Shipyard was sufficient to establish a triable issue.

Metalclad replied by noting (1) the "Ship List" identifying the USS Mispillion as one of the ships on which SCM worked was inadmissible hearsay, but even if accepted it showed that SCM worked on that ship in 1962, whereas Olson had testified in his deposition that he was on board the USS Mispillion at Todd Shipyard in 1961, and at Long Beach Naval Shipyard in 1962; and (2) the Olsons' showing of exposure to any of its products was no more than a "stream of conjecture and surmise," insufficient to raise a triable issue.

After a hearing on the motion, the court requested further briefing on whether it was enough for the Olsons to show that Metalclad was a major supplier to SCM, and whether they had established Olson's presence on board the USS Mispillion at Todd Shipyard in 1962. Along with its supplemental brief, Metalclad filed objections to various items of evidence the Olsons had attached to their opposition papers, including a declaration by a Navy Seaman, Samuel Yates, who was on board the USS Mispillion from January until July of 1962 at Todd Shipyard. In the brief, Metalclad contended the

partial military records offered by the Olsons failed to show he was at Todd Shipyard in 1962, and the Olsons' showing of exposure to Metalclad products was deficient because the SCM invoices did not identify the ships where the materials were used, nor did the "Ship List" place any Metalclad materials on any particular ship.

In their supplemental brief, the Olsons claimed John Olson's deposition testimony showed he was not sure that 1961 was the year the USS Mispillion went to Todd Shipyard; his military records showed he was aboard that ship in 1962; the Yates declaration established that the ship was at Todd Shipyard in the first part of 1962; testimony from SCM witnesses established that Metalclad was the largest of its three suppliers of asbestos products during the relevant time period; and the SCM invoices showed that Metalclad was SCM's sole supplier of asbestos insulation products during January 1962, when the USS Mispillion was overhauled at Todd Shipyard.

The court granted Metalclad's motion, ruling that their factual showing was sufficient to shift the burden of proof to the Olsons, who failed to produce sufficient evidence to raise a triable issue as to whether John Olson was exposed to Metalclad asbestos products. The Olsons moved for a new trial, which the court denied.

**DISCUSSION**

Our review is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859-860.) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

"Summary judgment law in this state . . . require[s] a defendant moving for summary judgment to present evidence, and not simply point out [footnote omitted] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . The defendant may, but need not, present evidence that conclusively negates an element of

the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence — as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. [Footnote omitted.]" (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 854-855.) The *Aguilar* court disapproved "[l]anguage in certain decisions purportedly allowing a defendant moving for summary judgment simply to 'point[]' out 'an *absence of evidence* to support' an element of the plaintiff's cause of action (e.g., *Hunter v. Pacific Mechanical Corp*. [1995] 37 Cal.App.4th [1282], 1288, italics in original) . . . ." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 855, fn. 23.)

The element in question here is John Olson's exposure to asbestos supplied by Metalclad. "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. [Citations.] If there has been no exposure, there is no causation. [Citation.] Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to the defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. [Citation.]" (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.)

Metalclad does not rely on admissions by the Olsons amounting to a concession that they lack sufficient evidence of exposure. Rather, it claims their discovery responses were so "factually devoid" or "factually vague" that the court could infer they lacked such evidence. (See, e.g., *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590-593; *McGonnell v. Kaiser Gypsum Co.*, *supra*, 98 Cal.App.4th at p. 1105.)

Before turning to that evidence, we note that Metalclad waived its evidentiary objections. It failed to secure any rulings on its objections from the trial court. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn.1, disapproved on another point in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853, fn. 19.) At the original hearing on the motion, Metalclad's counsel made passing references to obtaining a ruling but also told the court: "I have argued [similar] motion[s] before you regarding the same

ship list with similar evidence and been successful." Both in its written and oral presentations on the new trial motion, Metalclad expressly refrained from pressing its objections and argued that considering all the Olsons' evidence, they failed to establish any exposure to Metalclad products sufficient to support a cause of action. (Compare *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784 [objections not waived when court failed to respond to counsel's repeated requests for rulings].)

There was evidence before the court that: (1) John Olson was stationed on the USS Mispillion in the first part of 1962 (Olson's military records); (2) the USS Mispillion was at Todd Shipyard for an overhaul in early 1962 (the Yates declaration) ; (3) SCM worked on the USS Mispillion in 1962 (the Ship List); (4) SCM purchased asbestos products from three suppliers, and purchased the most such product from Metalclad (Syd Carpenter, Jr. deposition) ; (5) SCM purchased insulation products from Metalclad in December 1961 and January 1962 (Metalclad invoices to SCM); and (6) Olson remembered working on the boilers and "kind of clean[ing] up after the shipyard workers" while the Mispillion was at Todd Shipyard (Olson deposition).

The evidence before the trial court established triable issues of fact. Metalclad disputes the inferences that may be drawn from the evidence, but disputed inferences are not enough to support a summary judgment. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856; see also *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [on defendant's summary judgment motion, evidentiary doubts or ambiguities are resolved in plaintiff's favor].) The asbestos cases relied on by Metalclad involved considerably less evidence of exposure. (*Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 655-656 [no evidence defendant's product was at shipyard when plaintiff's ship was there]; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1421 [no evidence of defendant's product on plaintiffs' ships]; *Hunter v. Pacific Mechanical Corp*., *supra*, 37 Cal.App.4th 1282, 1289, disapproved in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 855 [no evidence defendant's employees were present at plaintiff's workplace]; *Chaknova v. Wilbur-Ellis Co.* (1999) 69

Cal.App.4th 962, 976-977 [no evidence defendant's products were at plaintiff's jobsites]; *McGonnell v. Kaiser Gypsum Co.*, *supra*, 98 Cal.App.4th at pp. 1104-1105 [same].) The court erroneously granted Metalclad's motion.

**DISPOSITION**

The judgment is reversed. The Olsons shall recover their costs on appeal.

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Parrilli, J.

We concur:

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Corrigan, Acting P. J.

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Pollak, J.